

Supreme Court of the United States

OCTOBER TERM, 1947

No. 190-193

In Proceedings for the Reorganization of a Railroad.

In the Matter

of

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY,

Debtor.

GERALD AXELROD, et al., constituting the CON-
VERTIBLE BONDHOLDERS GROUP, owners of
4½% Gold Bonds of the above-named Debtor dated
May 1, 1930,

Petitioners,

v.

JOSEPH B. FLEMING and AARON COLNOR, as
Trustees of THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Axelrod *et al.*, are several individual holders of unsecured Convertible Bonds of The Chicago, Rock Island and Pacific Railway Company. They seek review of the decision of the Circuit Court of Appeals for the Seventh Circuit directing the United States District Court in Chicago to confirm the Section 77 reorganization plan heretofore approved. The contentions made by this petitioner parallel and overlap those made by the Debtor in its petition to this Court (No. 184-189) for a writ of certiorari to review the same decision of the Circuit Court of Appeals. In order to avoid duplication

of briefs, the respondents have answered most of the contentions of Axelrod *et al.* in the brief submitted in opposition to the Debtor's petition. A copy of that brief is attached.

However, Axelrod *et al.* also make contentions concerning two matters which have no direct relation to the decision of the Circuit Court of Appeals directing confirmation, and we shall briefly discuss those two matters here.

1. The petition of Axelrod *et al.* and their supporting brief are based in large part on an alleged violation by the Chase National Bank of an alleged fiduciary duty to the Convertible Bondholders. It is impossible to understand the effort of these bondholders to inject this issue, since it is both *res adjudicata* and moot.

The claim is that certain collateral which the Chase National Bank took as security for loans to the Debtor should have inured to the benefit of the Convertible Bondholders. But the petition setting forth that claim (R. 4) was dismissed by order of the District Court in 1940 (R. 23); and the appeal from that order was dismissed for lack of prosecution by the Circuit Court of Appeals for the Seventh Circuit on October 3, 1941. The matter is therefore *res adjudicata*.

Furthermore, as mentioned in the Axelrod petition and brief (pp. 15, 36), the Chase National Bank and the other bank creditors sold their collateral when the injunction against such sale was lifted by the District Court, and the collateral (consisting of bonds of the Rock Island System) is now outstanding in the hands of the public (R. 247-248). Accordingly, the Chase National Bank is no longer a pledgee-creditor of the Debtor and is to receive nothing under the plan in respect of the collateral it originally held. It follows that any controversy between the Convertible Bondholders and the Chase National

Bank in regard to that collateral is, and for a long time has been, moot so far as the present reorganization proceeding is concerned and that there can be no excuse for seeking to inject any such issue into the present proceeding.

2. Axelrod *et al.* also incidentally state that they are seeking review by this Court of the decision of the Circuit Court of Appeals on June 9, 1947, granting a writ of mandamus which directed the District Court to comply with the mandate of the Circuit Court of Appeals issued on April 17, 1947, requiring confirmation of the plan. No ground is set forth, nor is any argument whatever made, to support the request for review of the decision granting the writ of mandamus. It is settled beyond question that an appellate Federal Court may issue a writ of mandamus to compel a lower court to comply with the mandate it has issued. In the present case the District Court did not in the first instance comply with the mandate requiring confirmation, but instead entered a conditional order of confirmation making changes in the plan which the Circuit Court of Appeals had ordered to be confirmed. Obviously the Circuit Court of Appeals properly issued the writ of mandamus in order to have its mandate carried out.

**THE PETITION FOR A WRIT OF CERTIORARI
SHOULD BE DENIED.**

Respectfully submitted,

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August 8, 1947.